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No. 08-322

In The
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Section 5 of the Voting Rights Act strikes at the heart of federalism, injecting the federal government directly into the state and local legislative process. As reenacted in 2006, §5 imposes a federal veto on jurisdictions selected based on 40-year-old data and extends it well into the twenty-first century, locking in place the legislative judgments of the 1960s, rather than reflecting any fresh analysis of where §5's extraordinary remedy might be needed today, if anywhere. That portrayal unfairly demeans current residents of all races in covered jurisdictions and diminishes both the progress our country has made and the gravity of the evils the civil rights movement fought to overcome. The approach taken by Congress in reenacting §5, and championed by appellees, treats racism as an inheritance that runs with the land rather than a manifestation of attitudes and actions of living individuals.

The VRA's bailout provision expressly authorizes political subdivisions like the district to seek exemption from §5's burdens. But the Department of Justice and the district court have interpreted the bailout provision so restrictively it cannot function as intended. If that provision were interpreted and applied consistent with its plain language, purposes, and history, bailout might function to restrain §5's overbreadth, mitigating constitutional concerns. The district's spotless record of respecting the rights of all its voters presents exactly the type of compliance bailout was intended to reward and encourage.

Regardless, the record amassed by Congress in 2006 demonstrates that remaining instances of discriminatory voting practices can be dealt with by ordinary litigation, not that the electoral gamesmanship that originally justified §5 continues systematically to pervade covered jurisdictions, nor that the animus that gave rise to such conduct remains, held in check only by §5. There is no indication that §5 is the only thing keeping today's officials from reverting to the ways of their long-ago predecessors, nor that the threat of conventional litigation is not now deterrent enough. Travis County's very defense of §5 in this suit illustrates the changed conditions that make §5's continuation indefensible—the provision was never directed to jurisdictions that were intent on protecting voting rights.

When upholding the far-reaching, federally intrusive §5 as enacted in 1965 and 1975, the Court recognized that this extraordinary prophylactic was an appropriate means of enforcing constitutional guarantees against voting discrimination only because exceptional conditions made enforcement by less intrusive means demonstrably futile. Those circumstances no longer existed in 2006, and no evidence in the 2006 record justifies keeping long-compliant jurisdictions in federal receivership for another quarter-century. At the very least, the Court should correct the district court's interpretation of the bailout provision to permit jurisdictions like the district to show they deserve exemption from §5.

ARGUMENT

I. THE DISTRICT IS ENTITLED TO PURSUE BAILOUT.

The preclearance coverage and bailout provisions work in tandem to require preclearance from States and political subdivisions for a period of time, but also to hold out the promise of bailout from those requirements on a showing of compliance with rigorous substantive criteria. The restrictive bailout mechanism defined by the district court defeats the parallelism created by Congress in the 1982 amendments, contradicts the broad definition of "political subdivision" applied throughout the VRA notwithstanding §14(c)(2), makes bailout a hollow promise for the vast majority of covered jurisdictions, and eliminates the best chance to measure voting-rights progress by covered jurisdictions by locking them out of any bailout opportunity.

Section 4(a) permits "any political subdivision of" a covered State to seek a bailout declaration. 42 U.S.C. §1973*b*(a)(1). Beyond limiting the category of political subdivisions that could be separately designated for coverage, the definition of "political subdivision" in §14(c)(2) has never previously been used to preclude application of the VRA's provisions to non-county political subdivisions. To the contrary, the term has been expansively interpreted in every instance to extend the duties and obligations of the VRA uniformly and comprehensively to political subdivisions like the district. The Court's holdings that §5 and other VRA provisions reach political

subunits other than counties or other entities that register voters turned on its conclusion that "Congress' exclusive objective in §14(c)(2) was to limit the jurisdictions which may be separately designated for coverage under §4(b)." *United States* v. *Board of Comm'rs of Sheffield*, 435 U.S. 110, 131, n.18 (1978); see *id.*, at 118, 120-122; *Dougherty County, Ga. Board of Educ.* v. *White*, 439 U.S. 32, 43-44 (1978); see also *Dougherty County*, 439 U.S., at 47 (Stevens, J., concurring) (recognizing that *Sheffield*'s treatment of §14(c)(2) compelled the result in *Dougherty County*), 54-55 (Powell, J., dissenting) (recognizing that *Sheffield* held a city is a political subdivision).[1]

Contrary to appellees' assertions, *City of Rome* v. *United States*, 446 U.S. 156 (1980), simply applied pre-1982 §4(a), which expressly limited bailout to States and separately covered subdivisions. *Id.*, at 164-165, 167-168. *Rome*, in fact, confirms that units not falling within §14(c)(2)'s definition must be regarded as "political subdivisions" for many purposes under the Act. *Rome* explains that *Sheffield* did not "suggest that a municipality in a covered State [like Rome] is itself a 'State' for purposes of the §4(a) exemption procedure." 446 U.S., at 168. And §5 authorizes only a "State or *subdivision*" to institute a §5 declaratory judgment action or make submissions to the Attorney General. 42 U.S.C. §1973*c*(a) (emphasis

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[1] Accord *Smith* v. *Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 592-594 (CA9 1997); *United States* v. *Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 554-555 (CA5 1980).

added). Absent the Court's limiting interpretation of §14(c)(2), units like the district could not initiate a §5 action or preclearance submission, nor have observers assigned or petition for their removal, *id.*, at §§1973*a*, 1973*f*(a)(1)-(2), 1973*k*(c), be subject to §2, *id.*, at §1973, be statutorily prohibited from using discriminatory requirements, *id.*, at §§1973(a), 1973*b*(a)(1), or required to protect language minorities' voting rights and provide non-English election information, *id.*, at §§1973*b*(f)(2), (f)(4).[2] Even appellees acknowledge that the §14(c)(2) definition of "political subdivision" cannot apply to §2. NAACP Br. 17 (citing *Smith*, 109 F.3d, at 592-593). Under the Court's precedent, Congress could not import the §14(c)(2) definition into §4(a) except by a relevant statutory change. See *Georgia* v. *United States*, 411 U.S. 526, 533 (1973).

Adding "though such determinations were not made with respect to such subdivision as a separate unit" following "any political subdivision of [a covered] State," 42 U.S.C. §1973*b*(a)(1), does not incorporate §14(c)(2) into §4(a). The phrase directly responds to *Rome* and does nothing to limit "any political subdivision" to only those political subdivisions that could be separately covered. Similarly, nor does

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[2] See, *e.g., City of Lockhart* v. *United States*, 460 U.S. 125, 129 (1983); *City of Dallas* v. *United States*, 482 F.Supp. 183, 184 (DDC 1979) (*per curiam*); *Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d, at 556; *James* v. *Humphreys County Board of Election Comm'rs*, 384 F.Supp. 114, 119 (ND Miss. 1974).

interpreting §4(a) according to its plain language "give the phrase 'political subdivision' two different meanings in Section 4(a)." NAACP Br. 18. That only certain types of political subdivision are eligible to have determinations made with respect to them "as . . . separate unit[s]," 42 U.S.C. §1973*b*(a)(1), does not require "political subdivision" to be read as referring to only such subdivisions.

Further, giving "political subdivision" its ordinary meaning does not fail to give "governmental units," 42 U.S.C. §1973*b*(a)(1)(D), (F), "independent meaning." NAACP Br. 18. Governmental units within the territory of a political subdivision are themselves political subdivisions *of the State* in which they reside, not the geographically larger political subdivision. The district, for example, is a political subdivision of Texas, not Travis County, but it is also a governmental unit geographically within Travis County that would have to be included in a county bailout.

Given the Court's prior interpretation of the §14(c)(2) definition, Congress's subsequent failure to abrogate that interpretation, the plain meaning of "political subdivision," and the uniform use of the phrase throughout the VRA, there can be no doubt that §4(a) authorizes the district to pursue bailout. To the extent appellees' contrary interpretation of §4(a) is even plausible, it must give way to the less constitutionally problematic conclusion that §4(a) establishes a broadly available route to release from §5's strictures. See *Clark* v. *Martinez*, 543 U.S. 371,

381-382 (2005); *Miller* v. *Johnson*, 515 U.S. 900, 926-927 (1995).

Appellees urge the Court to consider the country's past experience with §5 when evaluating the constitutionality of its 2006 reenactment. They also tout bailout as the safety valve that renders §5 congruent and proportional. In evaluating that assertion, and in choosing among plausible constructions of §4(a), the Court should consider the decades of experience with the post-1982 bailout regime. That, out of thousands of covered jurisdictions, only 15 (all in Virginia) have bailed out since 1982[3] demonstrates that bailout as it has been applied by DOJ cannot mitigate §5's overbreadth problem. Cf. Winke, Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportional Remedy, 28 N.Y.U. Rev. L. & Soc. Change 69, 111 (2003) ("The bailout provisions are thus required to cut the potentially overbroad preclearance remedy down to a size congruent with the problem of persistent racial discrimination in voting.").

At least one non-Virginia county is known to have attempted bailout and then abandoned the effort. Hebert, An Assessment of the Bailout Provisions of the Voting Rights Act, in Voting Rights Act Reauthorization of 2006 257, 273 & n.62 (Henderson ed., 2007). The very dearth of attempts illustrates

[3] Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.htm#note1.

that, as currently applied, bailout is an empty promise: unavailable to political subdivisions that can make the required showing and impossible for those DOJ will allow to try. It unnecessarily and unfairly creates a false impression of stagnation and failure that is contrary to the record of substantial progress. That result is inconsistent with Congress's expectation that, as early as 1982, a large number of covered jurisdictions had sufficiently positive records to qualify for bailout. See S. Rep. No. 97-417, at 59 (1982); H.R. Rep. No. 97-227, at 39 (1981). Properly interpreted, however, bailout could serve the supremely beneficial purposes of incentivizing political subdivisions to demonstrate a strong record of compliance and creating a measurable record of progress and success.

By interposing counties between the federal government and the States to which political subdivisions like the district answer, the restrictive interpretation of §4(a) also reorders state government. Appellees cite no authority for congressional power to endow one subdivision of a State with political control over another that it does not enjoy under state law. The version of §4(a) considered in *Rome* did not present this particular constitutional problem. Before 1982, only a State had control over whether its subdivisions could terminate coverage obligations that were incurred only because those entities were within a covered State. *Rome*, 446 U.S., at 167. A State always has control over its subdivisions, and that arrangement did not interpose one subdivision in a

State between the State and other subdivisions. See Williamson, The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bail-out Provisions, 62 Wash. U. L.Q. 1, 42 (1984).

Section 4(a) can and should be read to use "political subdivision" in its ordinary, broad sense. That interpretation is not merely plausible but compelled by precedent and the Constitution.

II. SECTION 5 CANNOT CONSTITUTIONALLY BE APPLIED TO THE DISTRICT.

In any event, the 2006 enactment of §5 exceeded Congress's power to enforce the Fourteenth or Fifteenth Amendments. Congress did not, and could not, show that the "exceptional conditions" that "can justify legislative measures not otherwise appropriate," *South Carolina* v. *Katzenbach*, 383 U.S. 301, 334 (1966), continue to obtain, justifying the perpetuation of federal preclearance. Section 5 is out of all proportion to such voting discrimination as may still persist, does not target the kind of discriminatory activity on which Congress primarily relied, and has no rational geographic or meaningful temporal limits.

A. The Court Has Consistently Scrutinized Whether Measures, Including and Particularly §5, Appropriately Enforce Constitutional Guarantees.

The standard for determining whether congressional action purporting to enforce the Reconstruction

Amendments is appropriate is a unitary one, drawn from the *Civil Rights Cases*, 109 U.S. 3 (1883), and *Katzenbach* and further explicated in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and subsequent cases. And that standard uniformly applies to legislation purporting to enforce either the Fourteenth or Fifteenth Amendment. See *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 373, n.8 (2001) (enforcement clauses "virtually identical").

While themselves suggesting that sharp distinctions divide *Katzenbach* from *Boerne* and arguing that only *Katzenbach* applies in reviewing Congress's reenactment of §5, appellees, ironically, accuse the district of "attempt[ing] to set up a strict dichotomy" between the two. AG Br. 7. But the district's consistent position has been that *Boerne* and cases following it are refinements of, not alternatives to, *Katzenbach*'s analysis. *E.g.*, Aplt.'s Br. 32-35. Because *Boerne* simply specifies the procedures of *Katzenbach*'s inquiry, applying *Katzenbach*'s standard requires consideration of the refinements explained in *Boerne* and subsequent cases.

Measures sweeping too far beyond proscription of constitutional violations do not "enforce" those guarantees and instead work impermissible substantive alterations to the constitutional fabric. See *Boerne*, 521 U.S., at 519. To guard against that danger, the Court has evaluated the relationship between such prophylactic legislation and the scope of specific problems Congress identified and the degree of the prophylactic's overbreadth. *E.g.*, *Fla.*

Prepaid Postsecondary Educ. Expense Board v. *Coll. Sav. Bank*, 527 U.S. 627, 639 (1999) (after "identify[ing] conduct transgressing" constitutional guarantees, Congress must "tailor its legislative scheme to remedying or preventing such conduct"). Procedurally, Congress must compile a legislative record evidencing a "history and pattern" of constitutional violations of the right purportedly being enforced, *Garrett*, 531 U.S., at 368, which for both the Fourteenth and Fifteenth Amendments requires demonstrating a pattern of purposeful discrimination in proportion to the legislative measures selected to remedy or prevent such conduct, see *Shaw* v. *Reno*, 509 U.S. 630, 641 (1993); *City of Mobile* v. *Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion).

Appellees suggest this framework is inapplicable because no interbranch conflict like that in *Boerne* over the meaning of the Free Exercise Clause arises with respect to §5. But the serial reenactment of §5, even more clearly than the attempted redefinitions of procedural due process in *Florida Prepaid* or equal protection in *Kimel* v. *Fla. Board of Regents*, 528 U.S. 62 (2000), and *Garrett*, risks radically altering the substantive protections afforded by the Fifteenth Amendment.

Although the amendment itself is not violated absent discriminatory intent, §5 preempts not only changes to voting practices made with no such intent that nonetheless produce discriminatory effects, but also any change that would likely have any marginal negative effect on protected minorities' effective

exercise of the franchise. See *Georgia* v. *Ashcroft*, 539 U.S. 461, 484-485 (2003). The one-way ratchet of nonretrogression has, over its four-decade life, ensured that the line demarcating conduct violating §5 deviates ever farther from that delimiting constitutional permissibility.

Nowhere is this concern clearer than in §5's encouragement of racial classifications in redistricting practices to satisfy the nonretrogression standard through creation and maintenance of majority-minority and other minority-group-favoring districts. See Thernstrom Amicus Br. 9-13, 25-37. Rather than guaranteeing citizens freedom from purposeful discrimination in voting based on race, the 2006 reenactment of §5 "blatantly mandates probable success for the preferred candidates of certain racial groups." *Id.*, at 27. To the extent §5 has been applied to suggest race be "*the* factor," *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2753 (2007), in redistricting, it is clearly in tension with Fourteenth and Fifteenth Amendment guarantees—perhaps outright violating them, see *Miller*, 515 U.S., at 927—rather than appropriately enforcing them. And this is but one example of Congress's attempted redefinition, through serial reenactment of §5, of the rights secured by the Fifteenth Amendment.

Additionally, in the 2006 reauthorization, Congress expressly attempts to override *Reno* v. *Bossier Parish Sch. Board*, 528 U.S. 320, 335-336 (2000) (preclearance can be denied only for vote dilution with retrogressive effect, regardless of purpose). 42 U.S.C. §1973*c*(a)-(c); H.R. Rep. No. 109-478, at 68

(2006) ("any voting change motivated by any discriminatory purpose is prohibited under Section 5"). That amendment imposes a different substantive constitutional standard in covered jurisdictions than elsewhere.

Moreover, constitutional concerns of the same magnitude as the separation-of-powers issue confronted directly in *Boerne* arise when Congress infringes other principles embedded in the Constitution, notably severely disrupting the state-federal balance. See *United States* v. *Morrison*, 529 U.S. 598, 620 (2000) ("[T]he language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government."). Appellees' failure to respect the continued vitality of federalism as a constitutional principle would radically transform congressional authority, requiring the conclusion that any valid proscription of behaviors that risk constitutional violations could be enforced by a federal preemptive scheme like §5. States could, for example, be required to submit architectural plans for federal preapproval on the same record that justified a simple cause of action against states under Title II of the ADA. But that cannot be correct. The enforcement authority granted Congress by the Reconstruction Amendments "was not intended to strip the States of their power to govern themselves or to

convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation." *Oregon* v. *Mitchell*, 400 U.S. 112, 128 (1970) (Black, J.).

Appellees misapprehend the nature and purpose of the analysis the Court consistently applies to test the validity of congressional attempts to enforce the Reconstruction Amendments by means encroaching on state sovereignty. There is no question that the Thirteenth, Fourteenth, and Fifteenth Amendments expressly give Congress power "to enforce" their guarantees against the States. U.S. Const., Amdts. 13, §2; 14, §5; 15, §2. Appellees beg the question when asserting that Congress enjoys near-limitless deference when enforcing the amendments. The Court's framework for analyzing statutes that infringe on state prerogatives is designed to determine whether they actually enforce constitutional rights or instead exert a power the Constitution does not grant Congress.

Under appellees' rule, Congress is free to legislate against the States and their subdivisions as it pleases as long as it purports to be doing no more than enforcing inarguable constitutional guarantees. But RFRA was not immune from scrutiny for overbreadth because Congress purported to be enforcing the fundamental First Amendment right of free exercise. *Boerne*, 521 U.S., at 519. As to §5, the issue is not whether Congress has the power to enforce Fourteenth and Fifteenth Amendment guarantees against racial discrimination in voting. It is whether,

in pursuit of that objective, Congress has the power to mandate preemptive screening of tens of thousands of local enactments—the vast majority of which are constitutionally innocuous—in some or all of the country. *Boerne* does not suggest that RFRA would have been permissible had it required local governments to submit every local ordinance potentially affecting religion to federal authorities for predetermination of whether they actually violated the Free Exercise Clause, at least absent a showing that such a measure was remotely proportional to actual violations.

Neither the Court's analytical framework nor the substantive standards of congruence and proportionality it embodies are altered by the fundamental nature of the rights protected. Nor did *Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721 (2003), or *Tennessee* v. *Lane*, 541 U.S. 509 (2004), vary the degree of judicial deference to congressional action in such a manner; rather, each properly considered the relative ease of demonstrating constitutional violations in the context of heightened scrutiny and emphasized that amassing a record of predicate violations was accordingly easier for Congress. See *Lane*, 541 U.S., at 524; *Hibbs*, 538 U.S., at 736. Appellees' assertion that, in actions enforcing the Fifteenth Amendment, Congress is at the zenith of its power is immaterial; the relevant point is that infringements of Fifteenth Amendment guarantees can theoretically be more easily compiled in a record supporting enforcement legislation. However, when, as in the 2006

enactment of §5, the congressional record demonstrates that the scope, scale, and nature of constitutional violations are not proportional to the purported remedy's infringement of state prerogatives, prophylactic legislation must fail because it does not "enforce" the Amendment.

Stare decisis in no way compels upholding a 2006 reenactment of §5 that the Court has never previously considered. Neither *Katzenbach* nor *Rome* upheld the abstract "Section 5," shorn of any context from its various legislative enactments, that appellees suggest. See, *e.g.*, NAACP Br. 22-28. *Georgia* v. *United States* did not expressly consider the 1970 renewal of §5, merely noting in passing that the Court had recently "upheld the basic constitutionality of the Voting Rights Act." 411 U.S., at 531-532. And appellees overread *Lopez* v. *Monterey County*, 525 U.S. 266 (1999), as upholding the 1982 enactment of §5. *E.g.*, AG Br. 6, 15; NAACP Br. 26, 29. *Lopez* no more addressed the constitutionality *vel non* of §5 than did the Court's recent decision in *Riley* v. *Kennedy*, 128 S.Ct. 1970 (2008). Both decisions concern the reach of the statutory language. *Riley*, 128 S.Ct., at 1977; *Lopez*, 525 U.S., at 282-284. The constitutional question in *Lopez* was that raised by California in its brief—whether §5 could be constitutionally applied to require preclearance of legislation enacted by a noncovered state when a covered locality sought to administer that change—not the constitutionality of §5 generally. *Lopez*, 525 U.S., at 282-284; Br. for Appellee State of California, at 1, *Lopez*, 525 U.S., at

266. Nor has the Court elsewhere passed on the 1982 enactment. See Karlan, Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act, 44 Hous. L. Rev. 1, 11-12 (2007) (noting that *Boerne* appeared to "deliberately avoid passing on the question" of congressional authority to reenact §5 in 1982).

Katzenbach and *Rome*—addressing the 1965 and 1975 enactments, respectively—each considered a unique legislative act and the distinct record amassed by Congress at different points in time. *E.g.*, *Katzenbach*, 383 U.S., at 334. Nor did *Boerne*'s treatment of *Katzenbach* constitute the specific reaffirmation of §5 that appellees suggest it does. *Boerne* lauded as the paradigmatic example of an appropriate congressional exercise of the enforcement power not §5 as a statutory provision, but *the 1965 enactment of §5 on the record then before Congress*. See 521 U.S., at 525-526. Indeed, if *Katzenbach* had the super-precedential effect appellees attribute to it, *Rome* would have never needed to reach the contention that changed conditions made the 1975 extension of §5 inappropriate. See 446 U.S., at 180-182. And *Rome*'s reliance on §5's (ever-extending) sunset provision as a justification for its constitutionality further confirms that the precedential effect of those decisions was intentionally limited to the specific congressional enactments at issue, not future ones. See *id.*, at 182; see also *Boerne*, 521 U.S., at 533. The Court has recognized that time limits were part of what made earlier enactments of §5 constitutionally appropriate

legislation when they occurred, *Boerne*, 521 U.S., at 533, a meaningless consideration if upholding one enactment of §5 validated the provision's renewal in perpetuity. The most recent reenactment of §5 must be considered on its own merits, not those of prior enactments, in light of the circumstances Congress confronted and evidence it weighed in 2006.

Similarly, neither congressional assumptions about the framework for reviewing its enactments nor the fact that "Congress was not legislating on a blank slate," NAACP Br. 32, warrants any variation in the standard for judging enforcement legislation. The consequence of the first premise would be that review of VRA reenactments would be forever inappropriately deferential merely because, in 1965, §5's dramatic intrusions on the constitutionally determined federal-state relationship were appropriate in light of then-existing emergency circumstances. And under the second, review of congressional action would be weakest at the precise point at which, assuming the legislation's effectiveness over time, the need for reenactment had been eliminated. Both premises are patently flawed.

The Court has consistently recognized that §5 addresses not voting discrimination in general but "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Katzenbach*, 383 U.S., at 335. The 1965 congressional record established that jurisdictions to be covered had a demonstrated, recent history "of staying one step ahead of the federal courts by

passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer* v. *United States*, 425 U.S. 130, 140 (1976) (quoting H.R. Rep. No. 94-196, at 57-58 (1975)); accord *Miller*, 515 U.S., at 926-927; *Allen* v. *State Board of Elections*, 393 U.S. 544, 567-568 (1969). Responding to that then-recent "egregious predicate[ ]," the 1965 and 1975 enactments of §5 had the presumably meaningful "termination dates" and rational "geographic restrictions" that "tend to ensure Congress' means are proportionate to ends legitimate under" the enforcement power. *Boerne*, 521 U.S., at 533. Under the same scrutiny the Court has always applied to enactments of §5, the 2006 enactment fails.

B. Preclearance Is an Extraordinary Intrusion on State Sovereignty, Reenacted Without Meaningful Limits on Geography, Scope, or Duration.

Preclearance is not the simple paperwork exercise appellees make it out to be, but the direct participation by federal officers in state and local lawmaking. Under §5, the federal Executive may function as a super-governor, vetoing duly enacted state legislation, or a supreme court overruling a State's highest court. See *Riley*, 128 S.Ct., at 1982. The Court has accordingly called §5 an "extraordinary step." *Id.*, at 1977. Because "[t]he federal system established by our Constitution preserves the sovereign status of the States," *Alden* v. *Maine*, 527 U.S.

706, 714 (1999), an intrusion like §5 cannot be taken lightly. *Miller*, 515 U.S., at 926-927.

The Court has invalidated purported remedies that infringe state sovereignty without drawing appropriate geographic lines. See *Morrison*, 529 U.S., at 626; *Fla. Prepaid*, 527 U.S., at 647. It has also emphasized the importance of showing that unconstitutional conduct purportedly targeted is of recent vintage. See *Garrett*, 531 U.S., at 369, n.6. Congress did not and could not show that the renewed §5 continues to be "confined to those regions of the country where voting discrimination" remains "flagrant." *Boerne*, 521 U.S., at 532-533.

Appellees have no real argument for how the §4(b) coverage formula—"reverse-engineered" in 1965, AG Br. 33, unchanged since 1975, and continuing to rely only on data from 1972 and earlier, 42 U.S.C. §1973*b*(b)—could draw rational geographic lines in 2006. Their only response is, essentially, that the outdated proxies continue to define jurisdictions known to have engaged in defiant discrimination through the 1960s. AG Br. 33-34. But Congress cannot rationally presume that officials in covered jurisdictions continue to engage in "unremitting and ingenious defiance of the Constitution," *Katzenbach*, 383 U.S., at 309, simply because it was so in 1965.

Within covered jurisdictions, §5's reach is wide and deep. Section 5 reaches all manner of state and local changes with even the arguable potential to affect voting. *Allen*, 393 U.S., at 566-567. As

illustrated by its application to a small utility district, it inserts the federal government into legislative processes right down to the neighborhood level, and it even reaches entities that do not conduct elections. *Dougherty County*, 439 U.S., at 44. Appellees' focus on similarities between the substantive standards for an objection under §5 and a violation of the Act's §2 is misplaced. The focus must be on the breadth of constitutionally benign conduct §5 touches by mandating federal vetting of thousands of innocuous changes by thousands of governmental entities.

Further, Congress's 2006 extension of §5 for another quarter-century indicates that Congress does not seriously regard it as time limited. The original five-year response to emergency conditions, *Katzenbach*, 383 U.S., at 334-335 (citing *Home Bldg. & Loan Assn*. v. *Blaisdell*, 290 U.S. 398 (1934), and *Wilson* v. *New*, 243 U.S. 332 (1917)), is now a 66-year remedy that appellees posit can continue to be justified indefinitely by the long history of pre-1965 discrimination.

C. The 2006 Congressional Record Establishes That §5 Is No Longer an Appropriate Remedy.

Appellees' insistence that §5 need not be justified by evidence that gamesmanship continues to pervade covered jurisdictions verges on conceding that the 2006 record contains no such evidence. And it ignores the Court's consistent recognition that

> "Congress took the extraordinary step of requiring covered jurisdictions to preclear all changes in their voting practices because it 'feared that the mere suspension of existing tests [in §4(a)] would not completely solve the problem, given the history some States had of simply enacting new and slightly different requirements with the same discriminatory effect.'" *Riley*, 128 S.Ct., at 1977 (quoting *Allen*, 393 U.S., at 548); accord *Miller,* 515 U.S., at 925; *Beer*, 425 U.S., at 140; *Katzenbach*, 383 U.S., at 335.

It also defies common sense. "[T]he cumbersome nature of case-by-case adjudication," AG Br. 52-54; Louis Br. 10-11, could not alone justify §5, otherwise §5 would apply nationwide, and similar preclearance regimes could be imposed to preempt constitutional violations of all sorts. When §5 was originally enacted, something unique about case-by-case litigation in covered jurisdictions warranted it: the iterative state action designed to thwart federal enforcement. *Katzenbach*, 383 U.S., at 309, 328 (noting "unremitting and ingenious defiance," "obstructionist tactics," and "systematic resistance").

Generalized evidence that discriminatory practices occur may justify the VRA's proscriptive, targeted §2, but more is needed to justify preemptive, scattershot §5. And §2 is at least as good a deterrent to constitutional violations as §5. Travis County cites avoidance of §2 suits as a purported benefit of §5. Travis County Br. 11. But it cannot explain how the mere threat of §2 litigation is not sufficient incentive

for the county to make its best efforts to protect voting rights, especially when "[i]t would undoubtedly prove more costly to the County to litigate a Section 2 case to conclusion." *Ibid.*

In considering the 2006 congressional record, appellees would have the Court ignore the forest for the trees. But the Court should look beyond appellees' exhaustive treatment of the voluminous record to recognize that the record utterly lacks evidence that the covered jurisdictions as a group persist in the conduct that warranted §5's uniquely intrusive remedy in 1965 or 1975. The record contains only a handful of examples that are even arguably instances of the gamesmanship §5 targets, a far cry from showing that the targeted conduct pervades covered areas or threatens to return. See *Garrett*, 531 U.S., at 369-370 (half-dozen relevant examples "f[e]ll far short of even suggesting the pattern of unconstitutional discrimination on which §5 legislation must be based").

Even if the more generalized evidence of discrimination were relevant to the particular remedy of preclearance, that evidence could not justify continuing §5 in its irrationally drawn coverage area. Properly viewed against the tens of thousands of voting changes and elections occurring in thousands of covered jurisdictions over decades, the comparatively very few problems identified hardly establish that case-by-case adjudication remains inadequate.

Appellees cannot point to evidence of systematic resistance, instead offering examples of incidents

that occurred decades apart, *e.g.*, Louis Br. 17-19 (discussing incidents in Waller County, Texas in 1978, the early 1990s, and 2004 and in Seguin, Texas in 1978, 1981, 1993, and 2002), incidents that were addressed quickly through case-by-case litigation, *e.g.*, *id.*, at 32-33 (discussing events in Newport News, Virginia resolved three months after §2 suit was filed), the abhorrent actions of private individuals upon whom §5 would have no effect, *e.g.*, *id.*, at 22 (arson); *id.*, at 28 (threats), or other isolated incidents, *e.g.*, *id.*, at 24 (1994 objection to water conservation district's apportionment plan). And the purported examples of gamesmanship intervenors cull from the record are far too few in number to justify §5's coverage of all or part of States, and, in any event, fail as even isolated illustrations of the type of conduct §5 targets.

For example, Dallas County, Alabama's three "separate objections in the 1990s," *id.*, at 47-48, occurred during a seven-month back-and-forth with DOJ over whether *any* reduction, no matter how small, of the minority population in a majority-minority district constituted retrogression. 1 Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary, 109th Cong. 388-390, 397-401 (2005) [hereinafter Section 5 History]; cf. *Georgia*, 539 U.S., at 472-473 (black voting-age population in majority-minority districts reduced to barely over 50%). Dallas County's submissions, each of which preserved an African-American majority of

well over 50% in the relevant district, reflected the uncertainty that surrounded what constituted "'a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise,'" which the Court did not define for another 11 years. *Georgia*, 539 U.S., at 472-473 (quoting *Bush* v. *Vera*, 517 U.S. 952, 982-983 (1996)). If anything, those three objections represent DOJ's efforts in 1992 at using §5 to dictate redistricting based solely on race. See *Miller*, 515 U.S., at 917-918 (finding that DOJ impermissibly used objections and three rounds of preclearance to "demand[ ] purely race-based revisions to Georgia's redistricting plans").

Similarly, intervenors' example involving Waynesboro, Georgia, Louis Br. 48, better demonstrates the ineffectiveness of §5 than persistent discrimination. The city was at odds with DOJ over a majority-vote requirement at various periods between 1972 and 1994, 1 Section 5 History, at 788-789, but engaged in no "ingenious" behavior that could not have been addressed through ordinary litigation.

Intervenors list 20 jurisdictions—out of the thousands required to preclear—that have received at least two §5 objections. But half of those have received no objections since 1993. Louis Br. 50.[4]

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[4] Indeed, in the most recent example cited, McComb, Mississippi was vindicated, and DOJ precleared the change. *Myers* v. *City of McComb*, 2008 WL 1366112, *1 (SD Miss. Apr. 8, 2008).

The Attorney General's attempt to justify §5 by asserting that there were more than 750 objections interposed between 1982 and the reauthorization of §5 in 2006 is misplaced. AG Br. 43. For one thing, each objection does not represent an instance of discrimination. And many reflect DOJ interpretations the Court subsequently rejected. Hasen, Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After *Tennessee* v. *Lane*, 66 Ohio St. L.J. 177, 192-193 (2005) (citing *Bossier Parish*, 528 U.S., at 341; *Reno* v. *Bossier Parish Sch. Board*, 520 U.S. 471, 474 (1997); *Miller*, 515 U.S., at 928). After *Miller* ended DOJ's practice of requiring the maximum number of majority-minority districts, 515 U.S., at 924-926, the number of objections decreased dramatically. From 1996 through 2005, DOJ registered only 72 objections out of 45,121 submissions, or only *seven per year*. H.R. Rep. 109-478, at 22. And 40 of the objections—more than half—were to redistricting plans, *id.*, which are fraught with partisan politics. See *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399, 410-413 (2006). Many of those redistricting plans could not have been objected to under *Georgia* v. *Ashcroft*'s totality-of-the-circumstances standard. See 539 U.S., at 480.[5]

[5] Even considering all 753 objections interposed between 1982 and 2005 and assuming—counterfactually—that all were bona fide, they remain a tiny fraction of the 105,143 submissions made in those 24 years, averaging only 31 objections per year from the thousands of entities required to seek preclearance. H.R. Rep. No. 109-478, at 22.

Nevertheless, the Attorney General attempts to justify renewing §5 with the 1965 coverage formula by asserting that the "rate" of objection increased in Mississippi and Louisiana after 1982. AG Br. 43. Not only does this not address the other jurisdictions, but it is not even accurate. In Mississippi, 112 objections were interposed between 1982 and 2006 while 57 were interposed between 1969 and 1981, indicating the rate over time remained roughly constant. 1 Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary, 109th Cong. 54 (2006) [hereinafter Evidence of Continued Need] (statement of Wade Henderson). Additionally, the Attorney General's assessment does not account for the significant increases in submissions after 1982; thus, the rate of objections per submission also declined. See Hasen, *supra*, at 190-191.

Although the number of objections is not evidence of gamesmanship or the inadequacy of case-by-case litigation, intervenors attempt to bolster that number by cobbling together all §5 objections, §5 enforcement suits, submissions withdrawn after MIRs, and §2 suits over 25 years. Louis Br. 25. Considered individually, the numbers are paltry: four §5 enforcement suits per year; eight §5 submissions withdrawn per year due to MIRs; and 24 §2 suits per year. Even taken together, those 1,500 incidents—which certainly overstates the number of constitutional violations as MIRs and objections do not alone establish discriminatory intent or effect—amount to

only 60 objections per year from across thousands of entities required to seek preclearance.[6]

Further, the resolution of §2 suits in favor of minority voters does not justify circumventing the normal litigation process; rather it demonstrates that case-by-case litigation is effective. And the numbers reveal that the caseload is manageable, especially by a DOJ whose resources are not dissipated by vetting tens of thousands of innocuous §5 submissions. The Attorney General cites the finding that 57% of the 117 §2 suits with outcomes favorable to minority voters were filed in covered jurisdictions. AG Br. 38.[7] But that amounts to 67 cases over 24 years, an average of less than 3 cases per year, hardly evidence of "unremitting and ingenious defiance." *Katzenbach*,

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[6] The Attorney General contends that MIRs were "particularly effective" from 1999-2005. AG Br. 46. Not only does this assume that MIRs always identify purposeful discrimination, but it ignores that the study cited found the effect of MIRs increased *relative to objections* only because MIRs have not decreased as precipitously as objections, though they have fallen by nearly 80% since 1994. Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 213, 218 (2006).

[7] The Attorney General claims covered jurisdictions, representing less than one-quarter of the Nation's population, were subject to more than twice their proportional share of successful §2 litigation. AG Br. 38. The Attorney General fails to mention that the study also found that 35% of the Nation's African-American, Hispanic, and Native American population resides in covered jurisdictions. See 1 Evidence of Continued Need, at 203. It is not surprising that fewer §2 suits are filed in racially homogeneous jurisdictions.

383 U.S., at 309. Moreover, it is difficult to understand how 17 additional suits in covered jurisdictions overwhelm the normal litigation process and justify an Executive veto, while the 50 suits in uncovered jurisdictions do not warrant an intrusion.

The Attorney General also discusses the number of "county-level voting practices" altered by §2 litigation. AG Br. 49. Of course, a single redistricting suit can result in changes across multiple counties. Without any context those numbers reveal little, except perhaps that Texas has more counties than most States. The example of North Carolina is, however, instructive because more than a third of the "county-level voting practices" altered by §2 litigation occurred in uncovered counties. 1 Evidence of Continued Need, at 287. Thus, the mere fact that §2 litigation occurs and has effects cannot justify §5.

Appellees also point to the presence of federal election observers as general evidence of discrimination permitting an inference of the type of gamesmanship at which §5 is aimed. AG Br. 48-49; Louis Br. 11. The Attorney General misleadingly implies that in 2004 there were almost 2,000 observers in *covered* jurisdictions. AG Br. 48. The testimony, however, was that almost 2,000 observers were deployed to at least 27 *unidentified* states. Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 9 (2006). Instead, the data collected by the National Commission on the Voting Rights Act indicates that since 1982, apart from Mississippi, observers have been

sent more frequently to New Mexico, which is not covered by §5, than any covered State. 1 Evidence of Continued Need, at 275. Meanwhile, observers have been sent to New Jersey, an uncovered state, 17 times since 1982—more often than to Texas (10), Louisiana (15), or Virginia (0). *Ibid.* Given Texas's population, number of counties, and entities required to submit changes for preclearance, the presence of observers on only ten occasions cannot justify its coverage under §5.

Nonetheless, intervenors strive to depict Texas as particularly worthy of §5 coverage. Louis Br. 14-24. But, again, the statistics belie the scale of the problem. From 1996 to mid-2005, DOJ interposed only ten objections to proposed voting changes in Texas. 1 Section 5 History, at 209-220 (appendix to statement of Bradley Schlozman). But even looking back to 1982, as intervenors do, DOJ interposed in Texas fewer than five objections per year. Louis Br. 15. And during that time, fewer than seven §2 suits per year were favorably resolved for minorities. *Ibid.* That §2 litigation resulted in more resolutions favorable to minorities than §5 objections suggests §2 is more effective. *Ibid.*

Finally, though the district court relied on the presence of racially polarized voting, see J.S.App.106-108, and Congress found it to be "the clearest and strongest evidence" it had "of the continued resistence [*sic*] within covered jurisdictions to fully accept minority citizens and their preferred candidates into the electoral process," H.R. Rep. No. 109-478, at 34, the

Attorney General offers only a half-hearted, one paragraph defense of racially polarized voting as evidence justifying §5. AG Br. 55. After acknowledging that such voting is not state action, the Attorney General asserts it is a precondition to vote dilution. *Ibid.* But, of course, there are many preconditions to vote dilution, and the mere presence of a single *precondition* to a constitutional violation does not empower Congress to act under the enforcement clauses. See *Fla. Prepaid*, 527 U.S., at 639 (Congress "must identify *conduct* transgressing the Fourteenth Amendment's substantive provisions" (emphasis added)). Merely identifying a *means* of discriminating does not establish a "history and pattern," *Garrett*, 531 U.S., at 368, justifying prophylactic measures. See *Hibbs*, 538 U.S., at 729.

Racially polarized voting is nothing more than the aggregated effect of free choices in voting by individuals, *Thornburg* v. *Gingles*, 478 U.S. 30, 56 (1986), not state action violating the Equal Protection Clause or the Fifteenth Amendment. See *Morrison*, 529 U.S., at 625; *Terry* v. *Adams*, 345 U.S. 461, 473 (1953) (Frankfurter, J.). Nor does racial bloc voting restrict the right to vote or even to vote for a candidate of one's choice; it simply does not implicate the guarantee of the Fifteenth Amendment.

To the extent §5 affects racially polarized voting at all, it likely exacerbates, rather than decreases, that phenomenon. As amici have explained, §5 is regularly interpreted to require gerrymandering to create or maintain majority-minority voting districts

in order to satisfy the burden of nonretrogression given shifting populations, and is even more regularly invoked, more or less ingenuously, as a rationale for doing so voluntarily. Thernstrom Amicus Br. 18-21. These practices not infrequently result in unconstitutional racial gerrymanders. *Ibid.* Indeed, as this Court has long recognized, "a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract" by reinforcing impermissible stereotypes and makes elected officials "more likely to believe that their primary obligation is to represent only the members of [a particular racial] group." *Shaw*, 509 U.S., at 648.

At bottom, appellees argue that §5 is intended to remediate voting discrimination generally, and therefore the record need only evince such discrimination, whether it be private conduct relating to voting or isolated incidents related to the complex and often partisan task of redistricting. Viewing §5's purpose at such a high level of generality is an improper attempt to make it indistinguishable from other aspects of the VRA, eviscerates the "congruence and proportionality" requirement, *Boerne*, 521 U.S., at 520, and renders illusory the demand on Congress to develop a record that establishes a "history and pattern" of deprivation to justify remedial legislation under the enforcement clauses, *Garrett*, 531 U.S., at 368.

CONCLUSION

For these reasons, and those discussed more fully in the district's opening brief, the Court should reverse the judgment of the district court and render judgment that the district is entitled to use the bailout procedure or, alternatively, that §5 cannot be constitutionally applied to the district.

Respectfully submitted,

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